

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

SAO NO.49 of 1999

DATE OF DECISION: October 11, 2006

Gurbachan Singh and another

....Appellants

VERSUS

Smt. Rupa and others

.....Respondents

CORAM:- HON'BLE MR. JUSTICE VINEY MITTAL

PRESENT: Shri Salil Sagar, Advocate for the appellants.
Shri J.R.Mittal, Senior Advocate with
Shri Kashmir Singh, Advocate for the respondents.

Viney Mittal,J.(Oral).

The present appeal has been filed by the defendants challenging the order dated August 10,1999, whereby the learned First Appellate Court, while allowing an amendment application filed by the plaintiff, Smt. Rupa under Order 6 Rule 17 of the Code of Civil Procedure has also commented upon the merits of the appeal and made observations that the case had not been properly decided by the learned trial Judge, has set aside the judgment and decree of the trial Court and remanded the case back to it for fresh decision.

A suit for declaration was filed by Smt.Rupa with regard to her rights in the property left behind by her father Harnam Singh. She claimed that she was also the owner of the property to the extent of rights described in the plaint. She also challenged sale deeds in favour of defendants No.7 to 9 executed by Surjan Singh, her brother.

She also challenged that the Will set up by Surjan Singh dated September 18,1972 was forged, fictitious and never executed by Harnam Singh.

The learned trial Court dismissed the suit filed by the plaintiff. One of the findings returned was that she was not in possession, therefore, the mere suit for declaration filed on her behalf was not maintainable.

The matter was taken up in appeal by the plaintiff. During the course of appeal, the plaintiff filed an application under order 6 rule 17 of the Code of Civil Procedure. By way of aforesaid amendment, she sought to convert the suit from mere declaration to that of possession also by additionally claiming the relief of possession. The said application filed by the plaintiff was contested. However, the learned First Appellate Court allowed the aforesaid amendment application filed by the plaintiff. While allowing the aforesaid amendment application filed by the plaintiff, the learned First Appellate Court also observed that the plaintiff had challenged the Will dated September 18, 1972 relied upon by Surjan Singh son of Harnam Singh and had claimed that the said Will was result of fraud and misrepresentation and was a forged document. In these circumstances, the learned First Appellate Court further observed that although the said Will had been contested by the plaintiff but no

issue with regard to the due execution of the Will had ever been framed by the trial Court and, therefore, the findings recoded by the learned trial Court with regard to the said Will were absolutely unjustified, without any notice to the parties qua the said issue. The learned First Appellate Court, in these circumstances, set aside the judgment and decree of the trial Court and after allowing the amendment, remanded the case back to the trial Court for fresh decision. The aforesaid order passed by the learned First Appellate Court is subject matter of challenge at the hands of the defendants before this Court.

I have heard Shri Salil Sagar, the learned counsel appearing for the appellants and Shri J.R.Mittal, the learned senior counsel appearing for the respondents and with their assistance have also gone through the record of the case.

Shri Salil Sagar, the learned counsel appearing for the appellants has vehemently argued that there has been no occasion for the plaintiff to seek amendment of the plaint at this late stage when the suit had been originally filed by her on November 15, 1991 and the appeal had been filed by her on March 10, 1997. According to the learned counsel, once the trial Court had dismissed the suit filed by the plaintiff being not maintainable as well, then it was absolutely not justified for the learned First Appellate Court to allow the plaintiff to remove the said lacuna in the plaint filed by the plaintiff.

Having given my thoughtful consideration to the aforesaid contentions of the learned counsel for the appellants, I do not find any merit in the same.

The plaintiff had filed a suit for declaration claiming her share in the suit property left behind by her father Harnam Singh.

It is well settled that co sharer is also deemed to be in possession of the suit property and the actual possession of the other co sharers is also the possession of the co sharer who is not in such possession. In these circumstances, I am of the considered view that no amendment was required to be sought by the plaintiff. The amendment sought by the plaintiff was merely to remove the technical defects. The same has been rightly allowed by the learned First Appellate Court.

However, I find force in the contention of the learned counsel for the appellants, when a contention has been raised that while consideration the application for amendment, the learned First Appellate Court was not justifiable to set aside the judgment and decree of the trial Court and remand the case back to the trial Court for fresh decision. According to the learned counsel, the aforesaid course could only be adopted by the learned First Appellate Court if after hearing the arguments on merits of the appeal. The learned First Appellate Court came to the conclusion that the case was required to be remanded back.

From the perusal of order passed by the learned First Appellate Court, I find that the learned First Appellate Court had in its impugned order merely considered the necessity of amendment sought by the plaintiff. In these circumstances, the course adopted by the learned First Appellate Court was absolutely unjustified and unwarranted. The learned First Appellate Court should have

considered the merits of the appeal and thereafter decided the same, in accordance with law.

Consequently, the present appeal is allowed to the extent that the matter has been remanded back by the learned First Appellate Court. The order of the learned First Appellate Court dated August 10, 1999 to the extent of ordering the remand is set aside. However, the amendment of the plaint directed by the learned First Appellate Court is upheld. The learned First Appellate Court is directed to proceed with the appeal, in accordance with law.

The parties through their learned counsel are directed to appear before the learned First Appellate Court on November 27, 2006.

Since the matter has remained pending for a considerable period, therefore, the appeal is directed to decide the appeal within a period of six months from the date of appearance of the parties.

October 11, 2006
KD

(Viney Mittal)
Judge